

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

COPY

MARY I. RALEY,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Employer.

Docket No. 97-12-112

FINDINGS, DECISION AND ORDER

BEFORE Board members Dallas Green, John F. Schmutz, Esquire, and John W. Pitts constituting a quorum of the Merit Employee Relations Board (hereinafter "Board" or "MERB") pursuant to 29 *Del. C.* §5908(a).

APPEARANCES:

For the Appellant: Roy S. Shiels, Esquire
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For the Department: C. Drue Chichi
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BACKGROUND

This grievance began when Mary Raley, an employee of the Delaware Department of Transportation, sought to grieve her perception that the Department had failed to follow posting and advertising requirements and had failed to adhere to its equal opportunity review procedures together with other alleged procedural violations including improper pre-selection in filling the positions of Deputy Director of Transportation and Transportation Planning Supervisor.

On December 19, 1996, Mary I. Raley, through counsel, filed an appeal with the Merit Employee Relations Board ("Board" or "MERB") after receiving the adverse decision of the hearing officer for the Director of the Office of State Personnel at the fourth step of the grievance process. After a series of delays, requested by both counsel, this appeal was set for evidentiary hearing which began on November 19, 1998 and continued on December 10, 1998. The hearing recessed on December 10, 1998 with the parties agreeing to submit any further evidence to the Board in written form including deposition and to thereafter mutually agree upon a briefing schedule for the submission of closing arguments to the Board. The Board agreed to convene to deliberate concerning this matter after such submissions. Counsel for the Appellant submitted the opening memorandum by letter dated April 12, 1999; the Department filed its written response by Memorandum on May 13, 1999 and Ms. Raley, through counsel, filed a reply Memorandum on June 18, 1999. The public deliberation of the Board on this matter occurred on August 5, 1999.¹ This is the Board's written decision and order.

INITIAL MOTION TO DISMISS

Initially, Ms. Raley filed her grievance over the process used in filling several positions at the Department of Transportation. One Transportation Planning Supervisor position was filled by Daniel LaCombe. Ms. Raley was an applicant for this position and there has been no objection to her grievance concerning this position on the basis of lack of standing by the Department. Another position which Ms. Raley sought to grieve on the grounds of improper pre-selection and discrimination on the basis of non-merit factors was that of the Deputy Director of Transportation.

¹For the deliberation on this grievance appeal, the Board consisted of John F. Schmutz, Esquire, Dallas Green and John W. Pitts. Former Chairperson Susan Parker resigned to accept a position on the staff of the Delaware Supreme Court on June 8, 1999 and Vice-Chairman, Robert Burns, who was not present for the evidentiary presentations in this case, did not participate in the deliberations.

By motion filed with the Board on February 24, 1998, the Department of Transportation sought the dismissal of a portion of Ms. Raley's grievance to the extent that it sought to grieve the filling of the position of Deputy Director of Transportation.

The Department contended that Ms. Raley did not have standing to grieve the filling of this position for which she neither applied nor sought to be placed into as relief for her grievance.

Ms. Raley, through counsel, filed a written response to the motion to dismiss asserting that the filling of the position in a manner which allegedly violated the Merit Rules adversely affected her since the position of Deputy Director was the supervisor of her present supervisor and therefore she had standing to grieve the filling of the position even though she did not apply for the position.

The Board heard oral argument from the parties on June 24, 1998 and, after deliberation, determined under the circumstances presented by this case, that Ms. Raley did not have standing to grieve the filling of a position for which she had not applied and therefore granted the Department's limited motion to dismiss as to the Deputy Director position.

SECOND MOTION TO DISMISS

At the conclusion of the testimony on November 19, 1998, counsel for the Department indicated to the Board that another motion to dismiss would be forthcoming. On December 7, 1998 the Department launched another motion to dismiss the remaining aspect of the grievance of Mary Raley for a lack of jurisdiction on the basis that she failed to file a written grievance following the selection of Mr. LaCombe. On December 8, 1998 the response of Ms. Raley to the motion was filed with the Board.

In dealing with this motion, the Board notes that Ms. Raley, in a letter dated June 18, 1995 addressed to the Director of the Office of State Personnel, initiated the grievance which was the subject of the fourth step hearing and the subsequent appeal to this Board. In her letter, which this Board saw for the first time as an attachment to the Department's motion to dismiss, Ms. Raley complained of, among other things, the impropriety of the apparent pre-selection of Mr. LaCombe to fill a position of Transportation Planning Supervisor. While the precise position for which Mr. LaCombe was selected was not the position Ms. Raley originally sought it was a subsequently

available Transportation Planning Supervisor position which became available even before the successful applicant for the original position had been announced. It was also one for which Ms. Raley was considered as an applicant by the Department. Under the special circumstances presented, it was clear that Ms. Raley's June 18, 1995 grievance was, among other things, directed to the alleged pre-selection of Mr. LaCombe for the position of Transportation Planning Supervisor and the process leading to that selection. Therefore requiring the grievant to file another or a supplemental grievance after the actual selection of the individual who was a subject of the original and then unresolved grievance would, in the view of the Board in this instance, be inequitable elevating form over substance. The failure to file a supplemental grievance after the actual selection of Mr. LaCombe for the position of Transportation Planning Supervisor does not divest the Board of jurisdiction to consider this appeal. The Department's December 9, 1998 motion to dismiss is denied.

SUMMARY OF THE EVIDENCE

On November 18, 1998, the parties entered into a 52 paragraph Stipulation of Facts which was filed with the Board and received into evidence on November 19, 1998 as Board Exhibit No. 1. The facts stipulated by the parties are set forth in their entirety:

1. Mary I. Raley is a permanent merit employee of the State of Delaware, employed by the Delaware Department of Transportation ("DelDOT"). From April 1989 until July 1992, she was employed as a Senior Highway Planner and from July 1992 onward as a Senior Transportation Planner. She has always received satisfactory or better job evaluations from DelDOT during her employment.

2. Ann P. Canby became Secretary of DelDOT in Spring 1993. She recruited Eugene Abbott as the Director of DelDOT's Planning Division.

3. On September 4, 1993, Mr. Abbott began work as the newly appointed Director of DelDOT's Planning Division. He has a Master's Degree in Public Administration. He worked for many years as a planner for local governments, the Federal government, and, just prior to DelDOT, for the District of Columbia.

4. Daniel LaCombe is currently a Transportation Planning Supervisor for DelDOT. He was and is qualified for this position at the time he was selected. The following is a summary of the employment history of Daniel LaCombe:

a. Prior to Assignment to the Division of Planning

- (1) Daniel LaCombe first worked for the State of Delaware while working on his Master's Degree in Public Administration at the College of Urban Affairs and Public Policy of the University of Delaware. He obtained his Master's Degree in June, 1990.
- (2) His first position in State employment was in the Controller General's office as a Legislative Fellow.
- (3) Mr. LaCombe then worked for the House of Representatives, again as a Legislative Fellow. He was the committee assistant and researcher for three House committees.
- (4) In July, 1990, after completing his Master's Degree, Mr. LaCombe found durational employment with the Delaware Department of Natural Resources and Environmental Control. In this position he acted as the project officer for the Waste Plan, computer model project, which attempted to provide a computer model of the generation, collection, processing, and disposition of Delaware's solid waste.
- (5) In late 1991, Mr. Reeb contacted Mr. LaCombe about working for the Department of Transportation. This led to an offer of full-time employment as a Program Analyst in the Program Development Section of the DTA, in Wilmington. However, this position was not in the Merit System, unlike some other position in the DTA. Instead, he was paid from funds budgeted to DAST, a subsidiary of DTA.

(b) After Assignment to the Division of Planning

- (1) In November, 1994, Mr. LaCombe was assigned to supervisory work in DelDOT's Division of Planning. [deletion in original stipulation] When he

came to Planning, he was assigned to work primarily on DelDOT's Long Range Plan (LRP), under the direction of Mr. Ralph Reeb. Mr. Reeb assigned Ms. Raley to work under Mr. LaCombe. Later, Linda Dixon and Michael DelTufo were also assigned to him for supervision. From November, 1994, until he was awarded a Merit system position, Mr. LaCombe continued to be paid by DAST.

- (2) As a supervisor in Planning prior to obtaining Merit System employment, Mr. LaCombe did not participate in any hiring decisions or interviews. He performed no official employee evaluations during this period.
- (3) Mr. LaCombe knew prior to coming to Planning that the Department was in the process of filling several Merit System positions, including the position to which he was temporarily assigned. He was told by both Mr. Reeb and Mr. Abbott that he would have to compete for the position when it was posted, if he wanted it.

5. On the List of Authorized Positions, LaCombe was shown as an employee of DTA from January 1993 through September 1995, when he was awarded the position of Transportation Planning Supervisor within the planning section of DelDOT. During this time, LaCombe received his salary from DTA and DTA was reimbursed for that amount by DelDOT.

6. LaCombe was physically transferred to DelDOT to work as a Transportation Planning Supervisor in the planning section of DelDOT in November 1994. He initially reported to Reeb and was assigned, among other things, to work on long range planning projects.

7. The DTA was created by Legislation, as a "public instrumentality" in 2 Del. C. § 1304(a), adopted in 1993. Section 1325 provides "such employees shall not be State employees for the purpose of wages, salaries, fringe benefits, or for purposes of any other benefit which may accrue to State employees, whether exempt or merit employees", but said such employees "shall be considered state employees for the purpose of participating in the group medical insurance and Deferred Compensation plans". These terms applied to Reeb, and also LaCombe while they were employees of DTA.

8. The purpose of DTA is specified by the Delaware legislature in 2 *Del. C.* § 1302:

(a) The General Assembly finds that:

- (1) There is a continuing need to apply the resources of the State to implement plans for air, water, vehicular, public and specialized transportation in the State;
- (2) There is a continuing need to implement such plans on a comprehensive and integrated basis for the benefit of all people in the State and the users of those facilities from other states in order to obtain an economical, efficient and unified system of air, water, vehicular, public and specialized transportation;
- (3) There is a continuing need to provide methods for financing existing and future transportation facilities in the State to maintain and develop such economical transportation systems for the health, welfare, convenience and safety of the people of the State and the users of those facilities from other states; and
- (4) Air, water, vehicular, public and specialized transportation facilities form a unified system of transportation because, among other reasons:
 - a. Such facilities, as a whole, contribute to the commerce of the State and unification of the planning for and financing of such facilities will increase the economic vitality of the State;
 - b. The use of 1 form of or facility for transportation will reduce congestion in the use of another form of or facility for transportation; and
 - c. The use of public and specialized transportation will reduce environmental pollution and conserve energy for the benefit of all users of transportation facilities and for the benefit of the people of this State and such unified system of transportation is of grave concern to the State.

9. The statutory purpose granted DelDOT is contained in 29 *Del. C.* §8401:

- (a) The Department of Transportation is hereby established. The Department, through appropriate divisions, authorities, subdivisions, offices and administrations shall have the power to perform and shall be responsible for the performance of all the powers, duties and functions vested by law in the Department of Highways and Transportation immediately prior to July 1, 1976.
- (b) The powers and duties of the Department of Transportation shall also include, but not be limited to, the following activities:
 - (1) Coordinating and developing, in cooperation with the federal government, other states, Delaware state agencies, counties, cities, councils and agencies comprehensive balanced transportation planning and policy for the movement of people and goods within the State;
 - (2) To be the lead agency for establishing and maintaining the continuing, comprehensive, cooperative transportation planning process pursuant to the existing and future provision of Title 23, United States Code and the Urban Mass Transportation Act of 1964 as amended [49 U.S.C. §5301 *et seq.*];
 - (3) To be the supervising and responsible planning staff for all urban and rural transportation studies and programs in the State and enter into any contracts, agreements and stipulations as required;
 - (4) To provide the necessary staffing, coordination and liaison required by present and future federal and state acts for transportation planning, programs, grant applications and required administration;
 - (5) Planning, designing, constructing, operating and maintaining those highway and public transportation systems under its jurisdiction;
 - (6) Preparing an annual transportation needs plan directed at the achievement of a coordinated and balanced transportation system for the State that is consistent with the state's social, economic and environmental needs and goals;

- (7) To establish a selection process intended to promote engineering and design quality and ensure maximum competition by professional companies of all sizes providing engineering or architectural design services, pursuant to the authority granted in Section 307 of the National Highway System Designation Act of 1995, P.L. 104-59. . . .

10. Prior to 1993, several planning functions had previously been carried out by the Delaware Transportation Authority. These activities centered on transit, but also included significant work on CAAA and ISTEA issues. Other planning functions were met by the regular planning unit within DelDOT, which was more highway oriented.

11. Immediately after taking his position with DelDOT, Abbott stated that existing planning projects within DelDOT were not in compliance with federal scheduling, and changes in the Planning section of DelDOT were required by ISTEA and the CAAA.

12. In late 1994, Abbott informed Fran Hahn, a planner in DelDOT's planning section, of DelDOT's intent to bring DTA employees into DelDOT's planning section to do long term multi modal planning. Hahn viewed these comment (sic) as a limitation on advancement and transferred from DelDOT's planning section in early 1995, which transfer was approved by Abbott.

13. Additional planning positions were requested by Abbott in Fiscal Year 1995 Budget Requests in the Spring of 1994. These were Program Manager I, Pay Grade 17 positions. Both of these positions had been approved by the Legislature by July 1995 (one on July 1, 1994) in the sense that the Budget Act approved sufficient amount of money, and a sufficient number of positions by title or position number.

14. In April 1994, Transportation Planning Supervisor position was posted by DelDOT. Grievant, Hahn and others applied for the position, but LaCombe did not. The position posting contained no preferential or selective requirements. The positions (sic) was awarded to Michael DuRoss, who began work in November 1994.

15. DelDOT began drafting job descriptions for long term planning positions (ultimately, positions 67358 and 66811) in August 1994. DelDOT did not assign the task to its personnel section. DelDOT assigned this task to Carolann Wicks, who performed the task from her home.

16. After the new positions were authorized in the budget, the process of actually filling the positions first required the completion of Position Classification Questionnaires ("PCQ"). The PCQs were reviewed at the State Personnel Office. SPO then determined the actual appropriate job class and title for the new/converted positions.

17. In the fall of 1994, Ray Harbeson, DelDOT's Director of Preconstruction and the Department's Chief Engineer, offered the services of one of his staff members, Carolann Wicks, P.E. She had specific training in the PCQ process.

18. Ms. Wicks worked on several PCQs, including those used for the positions eventually filled by Messrs. Cantalupo and LaCombe.

19. Wicks sought and received information from Reeb which she incorporated into the job description (minimum qualification, etc.) for the job descriptions being done by her. She worked from the draft PCQ filled out by Mr. Reeb, and suggested changes to it, which were made.

20. Wicks completed these descriptions and gave them to Abbott for review in late 1994 or early 1995.

21. Abbott permitted Reeb to review the documentation submitted by Wicks and make what Abbott termed "corrections". The documents as modified were transmitted by DelDOT to SPO in March of 1995 and May 1995. They were subsequently completed by SPO.

22. Once the positions were classified by the State Personnel Office ("SPO"), the Department began to fill the positions.

23. A Program Manager I position (Posting 95-03) was posted by DelDOT as a vacancy in January 1995. Grievant, Hahn and others applied for the position. Neither Reeb nor Lacombe (sic) applied for the position.

24. On January 18, 1995, Mr. Abbott signed a DelDOT Request to Fill Vacancy form relating to Position No. 66811, a Transportation Planning Supervisor. This Request included both Selective Requirements and Preferences.

25. On March 10, 1995, Mr. Abbott signed another Request to Fill Vacancy form for Position No. 67284, another Transportation Planning Supervisor. No selective requirements or preferences were noted for this position.

26. Position postings do not contain position numbers. Position numbers are assigned when an eligibility list is certified by the DelDOT, commonly referred to as a "Cert. List". Cert. Lists are created after a review of applicants and existing registers.

27. A Transportation Planning Supervisor position had been approved for DelDOT by SPO after the Fiscal Year 1994 Budget Act. That position was posted on March 24, 1995, listed by posting No. 95-08, and assigned Position No. 66811. It contained selective and preferential requirements relating to experience with legislature and with long range planning projects.

28. A Transportation Planning Supervisor Position without preferential or selective requirements was allegedly posted by posting No. 95-20, on March 24, 1995. Grievant denies seeing it. It was never advertised. Posting with DelDOT is physically done by DelDOT after approval by SPO. This position was ultimately given Position Number 67284.

29. Both postings were sent to SPO in the usual course of business. Posting #95-08 had a closing date of April 7, 1995, but posting #95-20 had no closing date. SPO received these postings and published the announcements.

30. In addition, #95-08 and another position unrelated to this grievance were advertised in newspapers.

31. One of the positions worked on by Wicks was assigned the title of Assistant Director, Pay Grade 21, by SPO and was posted and advertised in June 1995. It was given Position Number 67358.

32. The requirements for posting and advertising of positions to be filled is contained in Merit Rules Chapter 7, the intent of which is stated in Merit Rule 7.0100. Procedures are set forth in Merit Rule 7.0200.

33. Merit Rule Chapter 7 controls the manner in which positions are announced. Rule 7.0111 permits a vacancy posting either "for agency employees (intra-agency and/or inter-agency) only" (basically in-house) or for a public announcement for any qualified applicant, "as long as agency employees are considered in the filling of the vacancy."

34. Merit Rule 7.0200 sets forth posting announcement requirements which vary. With regard to public announcements of vacant positions, the appointing authority must cause the announcement to be in effect for 15 days before the closing date for receipt, if there is a closing date.

35. The Assistant Director of Planning position, #67358, was posted in compliance with Merit Rules Chapter 7.0000, and was advertised in the News Journal.

36. The Transportation Planning Supervisor Position, #66811, was posted in compliance with Merit Rules Chapter 7.0000, and was advertised in the News Journal.

37. The Transportation Planning Supervisor Position, #67284, was was not advertised.

38. The Department received applications for Transportation Planning Supervisor Posting #95-08. It received no applications for Transportation Planning Supervisor Posting #95-20.

39. On or about June 2, 1995, Human Resources Management's ("HRM") Judith Rini determined who met the minimum qualifications for Position No. 66811, #95-08. The register consisted of Joseph Cantalupo, Henry Collins, Jr., Francis Hahn, Daniel LaCombe, and Mary Raley. Ms. Rani issued the certification list for the position, and in this instance, the certification list was exactly the same as the full register.

40. Following issuance of the certification list, the Department conducted interviews for Position # 66811 on June 22 and 27, 1995. Interview teams for the two positions were selected by Abbott. The panel members were Carolann Wicks, Teresa Fulmer, Lawrence Klepner, and Eugene Abbott. Klepner initially was one of three applicants (including Reeb) for Position No. 67358 but withdrew before interviews.

41. This grievance does not allege any favoritism or pre-selection in the interview process, and does not include a claim that anyone sought to influence the interview panels to achieve particular results.

42. The panel members met before the interviews started and reviewed the interview questions, which had been prepared by Mr. Abbott. The panel also determined a sequence of who would ask each question, starting with Mr. Abbott. Each panel member was also given a copy of the applicants' resume and application for review prior to the interview.

43. Normal job filling procedure of DelDOT in 1995 included an Affirmative Action/Equal Employment Opportunity review done by a representative of the DelDOT Human Resources Management department.

44. Joseph Cantalupo was awarded the position, #66811, in the Long Range Planning Group.

45. When the interviews were held in June 1995, no document indicated two Transportation Planning Supervisor positions would be filled, nor was any comment to that effect made during the interview process.

46. The remaining applicants for position 66811 received no notice from DelDOT until July 24 and 26, 1995, when Annamay Decker, an assistant to Mr. Abbott, called each of the unsuccessful applicants for the position on the telephone. Ms. Decker asked them for permission to consider the TPS interviews already conducted for filling a second TPS position that had become available.

47. Grievant did not hear thereafter from DelDOT regarding the second position until the DelDOT indicated in August 1995 the position had been given to LaCombe. LaCombe began performance of that position, number 67284, in September 1995.

48. The interview panel considered all job experience reported by all applicants, including, but not limited to, the assignments and experience of LaCombe in those positions within DelDOT held by them in 1993, 1994 and early 1995. Relevant experience held by the candidates was considered to be a favorable factor in the interview and rating process.

49. 70 *Del. Laws*, Chapter 118, Section 241 (Fiscal Year 1996 Budget Act), enacted in June 1995 contained language indicating reallocation of non-merit positions formerly funded by DTA to DelDOT. It indicates funding certain non-merit DTA positions would continue for six (6) months during which DelDOT would work with SPO to fill new merit positions. It further provided:

The current employees holding these non-merit positions may continue to work for the Department as assigned until these positions are filled competitively, or until six months from the effective date of this Act, whichever is earlier, any other state law to the contrary notwithstanding.

For these employees, unless they obtained a Merit System position, they would be without a job by December 31, 1995. This is the first statutory enactment containing assignment of DTA positions language.

50. Section 240 of the same legislation amended Chapter 13, Title 2, by adding a new Section 1326 to provide:

Any employee of the Delaware Transportation Authority as of June 30, 1994, and retaining merit system status at that time who is transferred to the Delaware Transit Corporation before August 31, 1995, shall be deemed to be employed by the State in the classified service with all the benefits accrued as a merit employee as of July 31, 1995, notwithstanding any provision of Section 1325 of this Chapter to the contrary.

51. LaCombe was among the DTA-funded non-Merit employees affected by Section 241 of the FY96 Budget Act, who would lose their jobs should they not obtain merit positions by December 21, 1995.

52. LaCombe, until selected for above referenced DelDOT positions in 1995, was not a merit employee of DTA or the State of Delaware.

At the evidentiary hearing held on November 19, 1998, Francis J. Hahn was sworn and testified that he was working as a planner for the Department of Transportation in the Fall of 1993 when Eugene Abbott came into the Department. Mr. Hahn testified that he and Mr. Abbott met in the Fall of 1993 to discuss Hahn's position and the possibilities of promotion. According to the witness, Mr. Abbott had told him that individuals from the Delaware Transit Authority ("DTA") would be coming over to the Delaware Department of Transportation ("DelDOT") to do planning and that if Hahn wanted advancement he should check the job postings. Mr. Hahn testified that there was a second similar meeting in 1994 in which it was discussed that planners from DTA and outside individuals would be brought into the planning section. Hahn did not recall any specific names being mentioned but testified that he was aware that Reeb and LaCombe were doing planning at DTA.

Mr. Hahn was asked by Mr. Abbott to prepare a contract for a consulting group to assist the Department in developing job descriptions for the positions which were to be filled at DelDOT. The contract provided that certain positions were to be transferred from the Delaware Transit Authority. Mr. Hahn recounted that he had concerns about the legality of employing outside consultants to

develop the job descriptions and that the contract was never entered into by the Department. (Appellant's Exhibit No. 1)

Mr. Hahn told the Board that he became aware in 1995 of a posting for the position of Transportation Planning Supervisor. He saw the posting in the newspaper, applied, and was interviewed for the position which was posted with selective and preferential requirements. Sometime after the interview, he was called by Annamay Decker, the secretary to Mr. Abbott, who advised him of the existence of a second Transportation Planning Supervisor position. Mr. Hahn indicated that he wished to be considered for the second position and agreed with Ms. Decker that his interview for the first position could also be considered for the second position.

On cross examination, Mr. Hahn testified that he and Mary Raley were friends and that they had worked together. The witness recounted that it was early in 1994 when Eugene Abbott had stated that he wanted to bring DTA people over to DelDOT. Mr. Hahn had gone to see Mr. Abbott because a prior supervisor had promised Hahn a promotion. Eugene Abbott told Mr. Hahn that he could not honor such a promise and that he did not expect to have jobs for Mr. Hahn to move into in planning. Mr. Hahn also testified that it was not unusual for an employee to work on the preparation of his own Position Classification Questionnaire ("PCQ") and that he and a colleague had conferred on a PCQ and given it to the supervisor.

Mary I. Raley was sworn and recounted her background and employment experience with the Department of Transportation. She came to the Department in 1989 and has been in the planning department for 13 years. She is presently a Senior Transportation Planner with the Department and she had applied for the position of Transportation Planning Supervisor. In November of 1994, Daniel LaCombe became her supervisor. She was his only subordinate until the summer of 1995. In July of 1995 she began reporting to David Hugg, the State Planning Coordinator.

Ms. Raley recounted that after Mr. LaCombe's arrival she was relegated into more of a background role and her training and experience were not called on. She was put in a "go-for" status and was not invited to meetings. Mr. LaCombe was tapped to go to meetings and she was told to stay put and was not asked for her services. When Mr. LaCombe arrived, Ms. Raley, according to her testimony, was told that he was on board as a Transportation Planning Supervisor. She asked

him about it and was told that his position was not yet a merit job but that it would be a merit position by July 1995. She stated that she had applied for the Transportation Planning Supervisor position just before Daniel LaCombe arrived at the Department. Mr. Ralph Reeb had previously come from the DTA and told Ms. Raley that she would be placed under Mr. LaCombe. Ms. Raley told the Board that Mr. Reeb and Mr. LaCombe had worked together at DTA and Mr. Reeb had come from DTA to DelDOT in 1993. At DelDOT he occupied a supervisory position even though he was still a DTA employee. According to the witness, Mr. Reeb was her supervisor for about one year before Mr. LaCombe came to the Department.

Ms. Raley testified that she was aware of one Transportation Planning Supervisor position which was posted with selective and preferential requirements one of which was legislative liaison experience. She saw advertisements for the position and interviewed for it. After the interview she was called by Annamay Decker, the secretary for Eugene Abbott, and told of the existence of a second Transportation Planning Supervisor position and was asked by Ms. Decker if she wanted to be considered for the position. Ms. Raley stated that she was never interviewed for the second position and was never told why it had different requirements from the first position. The first position was filled by a Mr. Joseph Cantalupo and the second Transportation Planning Supervisor position was filled by Daniel LaCombe.

Ms. Raley testified that during her state employment she had never been supervised by persons who were not state employees except for Mr. Reeb and Mr. LaCombe during the time they were employees of DTA. She testified that she believed that the agency did not want her in the position of Transportation Planning Supervisor. Ms. Raley related that she had filed a grievance against Mr. LaCombe and Mr. Reeb and against the composition of the interview panel for the position of Transportation Planning Supervisor. The grievance was filed before she interviewed for the position and, during the interview, Mr. Abbott, one of the interviewers, stated that everyone knew about her grievance. Ms. Raley told the Board that she had feedback from her co-workers and knew that people took offense at her grievance.

On cross examination, Ms. Raley testified that she objected to being supervised by non-state employees Reeb and LaCombe. She stated that she could not recall if she had agreed to use the prior

interview for her consideration for the second Transportation Planning Supervisor position. She related that she had filed a grievance with the Equal Employment Opportunity Commission ("EEOC") about the position she did not get and alleged discrimination on the basis of age and gender. Ms. Raley testified that she believes that she was discriminated against for the position ultimately filled by Daniel LaCombe by virtue of his preselection for the position. No one specifically applied for the second position and the certification list for the first position was used as the basis for determining the applicants for the second position. Ms. Raley stated that she had worked on her own PCQ as had all state planners. She told the Board that, as to the selective requirement of the TPS position, she had some legislative experience in that she had reviewed rules that the Maryland legislature had considered. She also related that during her interview, Mr. Abbott had discussed her grievance in an exasperated tone of voice. She testified that she may have been the one who raised the subject of the grievance during the interview.

In discussing the filling of vacant positions at DelDOT, Ms. Raley stated that a Michael DuRoss had first come from a Washington DC consulting firm and then Ralph Reeb and Daniel LaCombe had come over from DTA and then Joseph Cantalupo was hired "off the street" into the Transportation Planning Supervisor position.

Annamay Decker, being sworn, testified that she is the administrative officer with the Department of Transportation and works directly with Eugene Abbott. She has worked with him for approximately five years. Ms. Decker testified that during the time when interviews were being conducted to fill the Transportation Planning Supervisor position there were approximately nine positions being filled at the Department. The positions had been created in the budget and were being established by the State Personnel Office and assigned position numbers. Among the positions there were two with the identical title of Transportation Planning Supervisor; however, these two positions were not set up at the same time. According to Ms. Decker, they received a certification list ("Cert. List") for the first Transportation Planning Supervisor position which was eventually filled by Joseph Cantolupo. That position was extensively advertised and published. Ms. Decker testified that there was a demand for people with the skills being sought and the response they had received for the first position was much less than had been expected. Ms. Decker stated that the first position had certain

selective and preferential requirements and the second position did not. The second job was not advertised rather, after consultation with the State Personnel Office, the position was filled from the individuals on the cert. list for the first position who had been interviewed.

Ms. Decker testified that the State Personnel Office told them that the list from the first position could be used to select candidates for the second position. She testified that she called all of the individuals on the list for the first position other than Joseph Cantolupo who she knew had been offered the first position. Ms. Decker told the Board that she did not know the interview ranking of the individuals she called at the time she spoke to them about the availability of the second position. Later she was told that Mr. LaCombe was the second choice after the interviews and that he would be offered the second position. Ms. Decker recounted to the Board that she had previously testified that people are very cautious around Mary Raley and that Ms. Raley was viewed as a problem employee. According to Ms. Decker, this impression goes back before June of 1995. Ms. Decker stated that she was aware of the way most people felt about Ms. Raley and that they avoided her for most of her career at the Department.

Annamay Decker recounted that she had previously testified that she was unsure of whether position no. 95-20 which was ultimately filled by Mr. LaCombe, was ever posted. She testified that she was certain that it was posted on March 24, 1995 with a closing date listed as "continuous until filled". The position was posted with a 2 digit number [Position 16] because it had not yet received a five digit position number from the State Personnel Office. Ms. Decker identified as State or Department Exhibit No. 2 a DelDOT position list she used to keep track of the open positions in various stages of being filled at the Department. Ms. Decker testified that she was certain that the position was posted because it had been received by the Department personnel section. The position was given a five digit number by State Personnel, according to Ms. Decker on March 2, 1995.

Ms. Decker recounted that she made the calls to the applicants for the first Transportation Planning Supervisor position concerning the availability of the second position on July 24, 1995. She identified (State Exhibit No. 3) an E-mail from Judith Rini of the DelDOT personnel office to her supervisors, Ms. Feierstein and Ms. Fibelkorn, dated Friday June 2, 1995 concerning the filling of the vacant positions at DelDOT. The E-mail notes that the second planning Supervisor position has no

applications. It also notes that Ms. Rini suggested to Ms. Decker that Planning might want to interview for both Supervisor positions from the first cert. list.

At the hearing before the Board on December 10, 1998, after argument and the decision which denied the Department's second motion to dismiss as discussed above, Mary Raley was recalled and, under oath, testified as follows:

She spoke with Mr. Gregory Chambers at the State Personnel Office informally complaining about the process which the Department was using to fill the Transportation Planning Supervisor position. Mr. Chambers was the Equal Employment Opportunity Officer and the person to whom informal discrimination complaints were to be taken. Ms. Raley stated that she had gone to Mr. Chambers about hiring at DelDOT. She stated that she filed her grievance letter within ten days of learning that the interview process was going to be permitted to go forward.

On cross-examination, Ms. Raley stated that she had spoken to Mr. Chambers in February of 1995 and that her more formal complaint was made when she learned that the process was going forward. She testified that she did complain about the selection of Mr. Burris for a planning position. She stated that the personnel director at the Department had tried to limit her grievance as set forth in her June 18th letter telling her it was not timely with respect to the other positions filled after her June 18th letter. She admitted that she had not filed another grievance after the filling of the Transportation Planning Supervisor position by Joseph Cantalupo and Ms. Raley asserted that she had never seen the posting for the Transportation Planning Supervisor position filled by Mr. LaCombe until the fourth step grievance hearing approximately a year later.

After the cross-examination of Ms. Raley, the Department renewed its motion to dismiss on the basis that her grievance was untimely filed as to the position ultimately filled by Mr. LaCombe since she was not aware of the position at the time of her June 18th grievance letter.

The Board, upon reconsideration, adhered to its prior ruling denying the motion to dismiss based upon the Board's determination that, under the circumstances presented, the original grievance of Ms. Raley was directed, among other things, to the filling of a Transportation Planning Supervisor position and would be considered as a timely filed grievance as to Mr. LaCombe's filling a Transportation Planning Supervisor position sought by Ms. Raley.

Michael Morton, first being sworn, testified substantially as follows: He is presently employed by the State of Delaware in the Office of the Comptroller General as Director of Operations. He testified that he recalled a budget request from DelDOT for certain positions to be transferred from the Delaware Transit Authority (DTA) to DelDOT. He stated that in one budget there were three positions coming from DTA to DelDOT and he recalled that in May or June of 1994 the names of Reeb, DuRoss and LaCombe were mentioned. These people were, Mr. Morton believed, already working at DelDOT as a part of the reorganization of DTA designed to consolidate the planning function within DelDOT. He related that these individuals were Delaware DAST employees which were under DTA. They were contract employees and not state merit system employees as such. DTA paid DAST employees with money the General Assembly appropriated to DTA. In FY 94, \$194,000 was appropriated by the General Assembly from the DTA budget to the DelDOT budget to cover three positions which were to be transferred from DTA to DelDOT. In 1995, there were three merit system positions created in the planning section of DelDOT and a total of eight new positions approved for DelDOT by the General Assembly.

Daniel LaCombe being sworn testified that he has been a State of Delaware employee for 9 years. In January of 1992 he came to work for DAST and was paid by checks signed by the State Treasurer. He stated that he was a state employee but that he was not a Merit employee. He was employed at DAST by DTA from January 1992 until he left in 1995. He stated that in November of 1994 he was reassigned and physically moved to the planning section of DelDOT. He knew of the reassignment in September 1994. Mr. Reeb went to planning at DelDOT in 1993. Mr. LaCombe testified that he knew that the position he was occupying in the planning section of DelDOT was a Transportation Planning Supervisor position.

Mr. LaCombe testified that he applied for and was interviewed for the Transportation Planning Supervisor position which was ultimately awarded to Joseph Cantalupo. No one told him that he would get the job and he was disappointed when he was not selected for the position. A week or so later he was advised that there was a second Transportation Planning Supervisor position available and asked by Annamay Decker if he wished to be considered for the position. He told her that he did and that he would agree to have his first interview considered for the second position. He

did not see the posting of the second position and did not apply for it although he did know that there would be a second Transportation Supervisor Position created. He has been in the position now for approximately three years. He lives in Bear, Delaware with his wife and three children.

On cross examination, Mr. LaCombe testified that he neither applied for nor saw the posting for the second position for which he was ultimately selected. He and Mr. Reeb were in class together at the University of Delaware and Mr. Reeb, who was not a social friend of Mr. LaCombe, encouraged him to apply for the job at DTA. Mr. LaCombe recounted that it was common knowledge that a second Transportation Planning Supervisor position was to be created but that he did not see the posting for the position.

Grievant introduced a List of Authorized Positions for the years 1992-95 at DTA to show that Mr. LaCombe was not carried in a budget position at DTA. (Grievant's Exhibit #4)

Carolann Wicks, being sworn, testified that she is presently the Assistant Chief Engineer for DelDOT and in that capacity supervises a group of engineers among other duties. She was formerly Corridor Management Engineer and also was a member of the interview panel for the position of Transportation Planning Supervisor. The applicants interviewed for the position were Joe Cantalupo, Dan LaCombe, Henry Collins, Fran Hahn, and Mary Raley. Ms. Wicks testified that each of those individuals interviewed were asked the same questions (States Exhibit No 4). Ms. Wicks testified that she participated in the preparation of the PCQ's for the manager position and for the TPS position. She stated there was nothing unusual in having an incumbent in a position assist in drafting the PCQ. She recounted that it was a data gathering process to describe the position and the content of the PCQ is finally up to the State Personnel Department. Ms. Wicks testified that she wrote the PCQ for the TPS position ultimately filled by Joe Cantalupo.

Eugene Abbott, being sworn, recounted his background and work experience. He came to Delaware September 4, 1994 to begin working as the Director of the DelDOT Division of Planning. The state was experiencing difficulty adjusting to changes in the Federal laws relating to changing planning requirements due to the passage of the Clean Air Act (CAA) and the Intermodal Surface Transportation Efficiency Act (ISTEA). Consolidation decisions were made and in 1994 the Secretary shifted planning positions to DelDOT planning because the planning function was being

consolidated there. According to Mr. Abbott, in the FY1994 budget there were three new positions created in Planning. In the FY 1995 budget three DTA positions were taken and the funding for them was shifted to DelDOT. It was a conversion and a net zero as the three positions came from DTA to DelDOT Planning.

Mr. Abbott testified that there was apprehension among the personnel concerning the reorganization and he spoke to Francis Hahn and other people about their future in the Planning Department. He told them that they would have to follow the rules and would have to compete for positions. Mr. Abbott testified that he was on the interview panel for the Transportation Planning Supervisor position which was ultimately filled by Joseph Cantalupo. He stated that his first choice for the position was Daniel LaCombe but that he did not try to influence the interview panel in who to choose. The witness stated that on the day that they did the interviews the people doing the interviewing were advised that there might be a second Transportation Planning Supervisor position open. The interviewers discussed the candidates and the position was offered to Mr. Cantalupo. Mr. Abbott stated that the personnel office told them that they could hire two Transportation Planning Supervisors based on the first set of interviews. He stated that if any one of those interviewed had objected to the use of their first interview for consideration for the second position that there would have been another round of applicant interviews.

On cross examination, Mr. Abbott stated that Mr. Reeb was working for the Secretary of the Department of Transportation in the Long Range Planning Section when Abbott came to the Department. In November of 1993, Mr. Reeb came to work in Mr. Abbott's Department. Before that Mr. Reeb was on the DTA payroll and he remained on the DTA payroll until he took a position on the DelDOT payroll. Mr. Abbott related that in the FY 1994 budget as a part of the DTA reorganization, \$194,000 was shifted from DTA to DelDOT planning because the planning functions were to be shifted also. Mr. Abbott testified there was a complaint made to the State Auditor's office concerning these positions and an explanation was provided by the Department. In the FY 95 budget three positions were transferred from DTA to DelDOT planning. Mr. DuRoss was transferred and so was Mr. Reeb. Mr. LaCombe came to DelDOT in November of 1994. Mr. Abbott told the Board that the General Assembly had approved the conversion of the three DTA positions to positions in

his planning unit and he was faced with a lot of work and deadlines and he decided to use Mr. LaCombe to do the work. According to Mr. Abbott, the DelDOT legal counsel had stated that LaCombe and the others at DTA were state employees such that they could be used and reassigned within the Department of Transportation.

In response to the question of whether he had made any negative comments about Ms. Raley prior to the selection of the individual to fill the position of Transportation Planning Supervisor which was ultimately offered to Joseph Cantalupo, Mr. Abbott observed that this was a turbulent time for Ms. Raley and that in July 1995 he had assigned her to a mapping (GIS) project to allow her time to regroup. Mr. Abbott stated that at meetings he did not make negative comments about Mary Raley and that she was not an agenda item. Mr. Abbott identified State's Exhibit No. 6 as a letter from the Department Secretary responding to questions from the State Auditor's office concerning the transfer of employees from DTA to DelDOT planning.

Mr. Abbott stated that Mary Raley had grieved and may have filed an EEOC complaint concerning the hiring of Donald Burris, a minority candidate for a position for which she was also an applicant.

On January 13, 1999, the deposition of David W. Matsen was taken at the law offices of Brown, Shiels & Chasanov in Dover, Delaware and submitted to the Board as the testimony of Mr. Matsen. Under oath at the deposition, Mr. Matsen recounted that he is the Engineering Program Manager for the Department of Transportation having worked for DelDOT for 34 years. He was among a number of managers who reported to Eugene Abbott when in 1993 he took a position within DelDOT. In that capacity, Mr. Matsen attended management meetings with Mr. Abbott and during such meeting, on occasion, heard Mr. Abbott making comments about where Molly Raley was being assigned. For a while, she was assigned to work at the State Planning Office. There were comments about her inability to get assigned jobs done and there were comments about the types of grievances which she was pursuing. According to Mr. Matsen, there were comments of a general nature implying that Ms. Raley was either a trouble maker or did not understand the job. Mr. Matsen opined that the effect of such comments was that the managers were expected to be part of the team and less sympathetic to Ms. Raley and they were. Mr. Matsen recalled that some of the comments were in

kind of mocking terms about the problems Mr. Abbott was having [with Ms. Raley] or what she was doing. According to Mr. Matsen's recollection, the comments about Ms. Raley by Mr. Abbott began to appear in the staff meetings after she was assigned to work with Mr. Hogue. Mr. Matsen recounted that the number of individuals in the planning office has approximately doubled since Mr. Abbott arrived in 1993.

DISCUSSION, FINDINGS AND CONCLUSIONS

It is clear that Mary Raley was not pleased with the assignment of Daniel LaCombe into a job where he functioned as her supervisor. In November 1994 when Mr. LaCombe was assigned to supervisory work in DelDOT's Division of Planning he was not a classified merit system state employee; rather he was on the payroll of Delaware Transportation Authority ("DTA"). The parties have stipulated that Mr. LaCombe was carried as an employee of DTA from January 1993 through September 1995 when he was awarded the position of Transportation Planning Supervisor within the Planning Section of DelDOT. They have also stipulated that Mr. LaCombe knew prior to coming to the Planning Section that the Department was in the process of filling several Merit System positions including the position to which he was temporarily assigned.

There is no dispute that Mr. LaCombe was and is qualified for the position of Transportation Planning Supervisor and it is also stipulated that he was told by both Mr. Reeb and by Mr. Abbott that he would be required to compete for the position when it was posted if he wanted it. The Board finds that Mr. LaCombe did want the position of Transportation Planning Supervisor; that he did compete for it, and, that, as stipulated by the parties, he was and is qualified for the TPS position for which he was selected.

In her appeal to the Board, Ms. Raley alleged: a) The failure of the Department of Transportation to follow posting and advertising requirements; b) Failure [of the Department] to adhere to its equal opportunity review procedures; c) unlawful transfer of funds and functions in contravention of legislative mandate; d) pre-selection of non-state employees by virtue of their transfer to positions before those positions were officially created in order to secure advantage for them as well as other actions taken for that purpose before the interview/selection; e) failure to follow

procedures by allowing Reeb to create specifications and qualifications for jobs awarded to Reeb and LaCombe; and f) statements of preference by Director Abbott before the hiring process began. At the end of the hearing, Ms. Raley's counsel stated that, "what we're grieving, quite simply, is a discriminatory and irregular process used for the selection of the transportation planning supervisor positions." (Transcript, P.324, Volume II).

The Board previously limited Ms. Raley's grievance appeal to the position ultimately offered to and accepted by Daniel LaCombe. In order to maintain a grievance concerning this position under Merit Rule No. 13.0100, Ms. Raley needs to establish by a preponderance of the evidence that there was a violation of Merit Rule 19.0100 [prohibiting discrimination for non-merit factors or any of the procedural requirements in the Merit Rules] or that there has been a gross abuse of discretion in the promotion. Ms. Raley has not met her burden of proof of a violation of Merit Rule No. 13.0100. The parties have stipulated that Mr. LaCombe is qualified for the position and that there were no irregularities with the interview process. (Exhibit #1, Stipulation of Facts, Paragraph 41)

The essence of Ms. Raley's grievance is coupled with and integrally tied to the reorganization of the Planning Section of DelDOT and originates in the assignment of certain individuals, including Mr. LaCombe, from the DTA to the planning section of DelDOT to assist the Department in meeting its requirements under certain federal legislation (the Intermodal Surface Transportation Efficiency Act or "ISTEA" and the Clean Air Act "CAAA"). The plan to move individuals with planning experience from DTA to the Planning Section of DelDOT, according to the testimony of Michael Morton, began in May or June of 1994. This is considerably prior to the actual creation of the "position" of Transportation Planning Supervisor which was ultimately filled by Mr. LaCombe. The testimony presented established there were DTA paid "employees" who were transferred into the Planning Section at DelDOT. This situation was specifically addressed by the General Assembly and, as the parties have stipulated, 70 Del. Laws, Chapter 118, Section 241 (Fiscal Year 1995 Budget Act), enacted in June 1995 contained language indicating reallocation of non-merit positions formerly funded by DTA to DelDOT. The legislation indicates that certain non-merit DTA positions would continue for six months during which time DelDOT would work with the State Personnel Office to fill new merit positions. The parties have also stipulated that Daniel LaCombe was among the DTA

funded non-merit employees who would have been affected by the act. The legislation, as the parties have stipulated, provided that the current employees holding the non-merit positions could continue to work for the Department as assigned until the positions were filled competitively or until six months from the effective date of the act whichever is earlier, "any other state law to the contrary notwithstanding." (Emphasis added).

Mr. Abbott testified convincingly that he had expressly advised his assigned employees, including Daniel LaCombe, that they would be required to compete for the new positions which were to be created. This is fully consistent with the directive of the General Assembly in Section 241 above.

The reorganization of DTA coalesced with the determination by Director Abbott that there was an immediate critical need for expertise in certain federal transportation enactments to enable the Department to avoid missing federally imposed deadlines. These deadlines accelerated the need to fill certain positions within the Department's Planning Section. The parties have stipulated that immediately after taking his position with DelDOT, Mr. Abbott stated that existing planning projects within DelDOT were not in compliance with federal scheduling, and changes in the Planning section of DelDOT were required by ISTEA and the CAAA. While it may not be common for non-merit employees to be given assignments where they are required to supervise merit employees, it does occur and Ms. Raley has not shown that there was anything improper or in violation of the Merit statutes or rules with the assignment of DTA personnel to the Planning Section of DelDOT or with her assignment to work under Mr. LaCombe's supervision.

In the circumstances presented, the assignment of employees such as Mr. LaCombe to work in the Planning Section of DelDOT can not be said to amount to their improper "pre-selection" for the positions which were ultimately processed by the State Personnel Office and duly posted. There was a recognition by everyone involved, including the Delaware General Assembly, that the positions were to be ultimately filled on a competitive basis. Based on the evidence presented in this proceeding, the position which was filled by Mr. LaCombe was filled on a competitive basis by a fully qualified candidate.

Ms. Raley maintains that the physical transfer of Mr. LaCombe and his assignment of Transportation Planning Supervisory duties to him was beyond the authority of the Department of Transportation and thus impermissible. Therefore, she reasons, he was improperly advantaged to her detriment in the award of the position of Transportation Planning Supervisor. Ms. Raley has failed to establish that it was illegal or improper to assign a DTA employee such as Mr. LaCombe to planning duties with the Department of Transportation. The Department has continually asserted its authority to assign individuals such as Mr. LaCombe, who were DTA employees to positions within the Department under 29 *Del. C.* §8404 (State's Exhibit No. 6). However, even if the Department Secretary and her legal counsel were in error as to the authority of the Department to use the services of Daniel LaCombe in the Planning Section of DelDOT in November of 1994 such an error would not necessarily form a basis to set aside the selection of Mr. LaCombe for the position of Transportation Planning Supervisor for which, as Ms. Raley has stipulated, he was and is fully qualified.

Ms. Raley also attacks the manner in which the Position Classification Questionnaires were completed after the positions in the Planning Section were authorized in the Budget Bill by the General Assembly. There was clearly some confusion in the process of specifying the requirements for the new positions. Mr. Abbott originally began with a view to having outside consultants describe the positions. That met with opposition from the Office of State Personnel and Carolann Wicks, P.E., who had been trained in the PCQ process, was made available to work on the project. She was, according to the stipulation of the parties, made available for this assignment by the Department's Chief Engineer. The testimony as well as the stipulation of the parties, suggests that there were a number of sources of information provided to Ms. Wicks on the job descriptions. She completed the descriptions, making the changes she felt appropriate and gave them to Mr. Abbott in late 1994 or early 1995 according to the parties' stipulation. Thereafter there were further modifications made by Mr. Reeb and the documents were subsequently completed by the State Personnel office. Ms. Raley infers that this process facilitated and furthered the "pre-selection" of which she complains. However, the evidence does not support this claim. Position No. 66811 was for a Transportation Planning Supervisor and was the position for which both Ms. Raley and Mr. LaCombe applied. It

had selective requirements and preferences relating to experience with legislature and with long range planning projects. However, neither Ms. Raley nor Mr. LaCombe was selected for this position although, according to the testimony of Mr. Abbott, his first choice for the position was Mr. LaCombe. The position was offered to and accepted by Joseph Cantolupo. This was the position for which, according to the stipulation, Mr. Abbott had signed a Request to Fill Vacancy form on January 18, 1995. Thereafter, on March 10, 1995, he signed another Request to Fill Vacancy form for Position No. 57284. This was another Transportation Planning Supervisor position but one which did not have any selective or preferences attached to it and is the one which was offered to Mr. LaCombe. In response to the telephone call from Annamay Decker all of the individuals interviewed for position no. 67284 agreed to allow their first interview to be used for the second position as well. There is no reasonable basis to conclude that the preparation of the PCQ for the position of Transportation Planning Supervisor was anything other than a good faith attempt to appropriately describe the legitimate expectations of the position. Ms. Raley does not identify any of the knowledge, skills, abilities or attributes of the position which can be said to have been included as an attempt to ensure the success of any particular candidate. Ms. Raley's inference that the selective and preferential requirements included in position no. 66811 were designed for the experience of Daniel LaCombe is somewhat weakened by virtue of the fact that the position, for which both Ms. Raley and Mr. LaCombe were in competition, was ultimately awarded to Joseph Cantolupo.

As to the process used to advertise and post the positions, there is some factual dispute as to whether or not the second Transportation Supervisor position was properly posted. The parties have stipulated that position no. 66811 was properly posted and properly advertised and that position no. 67284 was not advertised. According to the stipulation Ms. Raley did not see the position posted and did not see the posting until the fourth step grievance hearing. She continues to insist that it was not properly posted in technical violation of the Merit Rules (See Merit Rule No. 7.200). In this regard, Annamay Decker testified that there had been extensive notice and advertising for the Transportation Supervisor position which was filled by Mr. Cantolupo at significant expense to the Department with very disappointing response. Under the circumstances, after consultation with the Personnel Office the determination was made to use the "Cert" list from that position to fill the

second position. Ms. Raley was actually considered for both positions, as were all others except the successful applicant, Joseph Cantolupo. The parties have stipulated the grievance does not allege any favoritism in that interview process and does not claim that anyone sought to influence the interview panel to achieve particular results. Therefore, as to Ms. Raley, whether or not the posting and advertising was appropriate is a moot point and the Board need not resolve the factual dispute as to whether or not the notice of position no. 67284 was duly posted. To the extent that there were any "procedural irregularities" associated with the posting and lack of advertising of position no. 67284 they have been explained reasonably by the testimony of Ms. Decker. They did not disadvantage Ms. Raley nor interfere with her consideration for the position and do not amount to credible evidence of the "stealth" creation of a special position for Daniel LaCombe.

As another part of her presentation to the Board, Ms. Raley sought to establish that Director Abbott spoke ill of her in staff meetings and discussed other grievances which she had instituted. The inference is that Director Abbott thereby either retaliated against Ms. Raley or discriminated against her in her non-selection for the Transportation Supervisor position. This claim would seem to be contravened by the parties' stipulation that no one sought to influence the interview panel to achieve a particular result. In addition, Ms. Raley indicated that she may have been the one who brought up the subject of the grievance in the interview. Furthermore, the parties have stipulated that Mr. LaCombe was and is qualified for the position and have also stipulated that the interview panel considered all job experience reported by all applicants including, but not limited to, the assignments and experience of Mr. LaCombe in those positions within DelDOT held by them in 1993, 1994 and early 1995 and that relevant experience held by the candidates was considered to be a favorable factor in the interview and rating process.

There is evidence from the testimony of Mr. Abbott and Ms. Decker that Mary Raley, well prior to this grievance, experienced difficulty in her interpersonal relations with other employees in the Department. She was considered a problem employee and one around whom others were, in Ms. Decker's term, "cautious".

Finally, Ms. Raley seeks to have the Board infer significance in the fact that an Affirmative Action/Equal Employment Opportunity review by a representative of the DelDOT Human Resources

Management department was not performed for this position. There is no Merit System regulatory or statutory requirement for such review to be performed. The fourth step hearing examiner's notes of the testimony given by Philip Fenimore at the fourth step hearing reflect that there was nothing unusual about the absence of such a review in the case of the positions filled by Mr. Reeb and Mr. LaCombe since the Department was, at that time, reviewing about 80% of the positions.

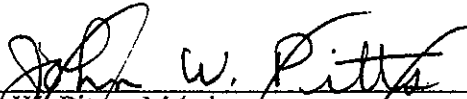
In sum, the Board does not find procedural irregularities occurred sufficient to set aside the award of the position of Transportation Planning Supervisor to Daniel LaCombe. Nor does a preponderance of the evidence presented establish that there was improper "pre-selection" of Mr. LaCombe for the position. He was required to compete for the merit system position by both Mr. Abbott and by the General Assembly and he did so successfully. And, as Ms. Raley has conceded in her stipulation, he is fully qualified for the position.


For these reasons and the reasons set forth in the decision of the fourth step hearing officer, the grievance appeal is denied.


ORDER

The above-captioned grievance appeal filed by Mary Raley is **DENIED**.

BY ORDER OF THE BOARD this 25th day of August, 1999.


John W. Pitts, Member


Dallas Green, Member


John F. Schmutz, Esq., Member

APPEAL RIGHTS

29 Del. C. § 5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with the law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del. C. § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: Sept. 2, 1999 *JA*

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Merit Employee Relations Board

Dallas Green, Member

John F. Schmutz, Member

John W. Pitts, Member

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